83 - 1526

No.

In The
Supreme Court of the United States

October Term, 1983

Alan J. Karcher, Speaker
New Jersey Assembly, *et al.*,
Appellants,

v.

George T. Daggett, *et al.*,
Appellees.

On Appeal from the United States District Court
for the District of New Jersey

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether the District Court erred in rejecting, as a replacement for the New Jersey congressional redistricting statute held to contain unconstitutionally high population deviations in *Karcher* v. *Daggett*, —— U.S. ——, 103 S.Ct. 2653 (1983), proposed plans which it found were "virtually identical" to the State's enacted redistricting plan, and which reduced the absolute population deviation from 3,674 people to 67 people, 42 people, and 17 people, respectively.

PARTIES BELOW

Appellant Alan J. Karcher is the Speaker of the New Jersey Assembly. Appellant Carmen A. Orechio is the President of the New Jersey Senate. Appellants James J. Florio, Robert G. Torricelli, William J. Hughes, James J. Howard, Robert A. Roe, Peter W. Rodino, Jr., Joseph G. Minish, and Bernard J. Dwyer are Democratic Members of Congress from New Jersey. Appellants were permitted to intervene as parties defendant in the proceedings in the district court.

Appellees Edwin B. Forsythe, Matthew J. Rinaldo, James A. Courter, Margaret S. Roukema, and Christopher M. Smith, Republican Members of Congress from New Jersey, and George T. Daggett, Thomas Dunn, Livio Mancino, Rev. Millard D. Birt, Rafael Fajardo, Margaret Dougherty, Maretta N. Jackson, C. Joseph Lillo, and Taxpayers Political Action Committee were plaintiffs in the proceedings in the district court.

Appellees Thomas H. Kean, Governor of the State of New Jersey, Irwin Kimmelman, Attorney General of the State of New Jersey, and Jane Burgio, Secretary of the State of New Jersey, were defendants in the district court.

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ALAN J. KARCHER, SPEAKER
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OPINIONS BELOW

The opinion of the three-judge district court on remand,
App. A, *infra*, is not yet reported. The District Court's
previous opinion is reported *sub nom. Daggett* v. *Kimmelman*, 535 F.Supp. 978 (D.N.J. 1982). This Court's opinion is reported at —— U.S. ——, 103 S.Ct. 2653 (1983).

JURISDICTION

This case is before the Court for the second time. It
involves two consolidated actions challenging the New

Jersey congressional redistricting statute, P.L. 1982, c.1, which were heard and determined by a district court of three judges pursuant to 28 U.S.C. § 2284(a). The district court declared the statute unconstitutional and enjoined its enforcement. 535 F.Supp. 978 (D.N.J. 1982). On appeal, this Court affirmed and remanded for a determination of the proper remedy. —— U.S. ——, 103 S.Ct. 2653 (1983). On February 17, 1984, the district court entered an opinion and order commanding the State defendants to conduct congressional primary and general elections under the "Forsythe, et al. Plan". App. A, B, *infra*. Appellants, who were intervenors below, filed a notice of appeal in the district court on March 2, 1984. App. C, *infra*.

This Court has jurisdiction of the appeal under 28 U.S.C. § 1253.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Article I, Section 2 of the United States Constitution provides:

> The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the qualifications requisite for Electors of the most numerous Branch of the State Legislature.

> No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and has been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those

bound to Service for a Term of Years, and excluding
Indians not taxed, three fifths of all other Persons.
The actual Enumeration shall be made within three
Years after the first Meeting of the Congress of the
United States, and within every subsequent Term of
ten Years, in such Manner as they shall by Law
direct. The Number of Representative shall not ex-
ceed one for every thirty Thousand, but each State
shall have at least one Representative; and until such
enumeration shall be made, the State of New Hamp-
shire shall be entitled to chuse three, Massachusetts
eight, Rhode Island and Providence Plantations one,
Connecticut five, New York six, New Jersey four,
Pennsylvania eight, Delaware one, Maryland six,
Virginia ten, North Carolina five, South Carolina
five, and Georgia three.

When vacancies happen in the Representation
from any State, the Executive Authority thereof
shall issue Writs of Election to fill such Vacancies.

The House of Representative shall chuse their
Speaker and other Officers; and shall have the sole
Power of Impeachment.

The New Jersey reapportionment statute, New Jersey
P.L. 1982, c.1, is set forth as an appendix to the district
court's original opinion, 535 F.Supp. at 985-987.

STATEMENT OF THE CASE

This is an appeal from the decision of a three-judge
district court ordering into effect a plan revising New
Jersey's congressional districts and commanding that it be
used in all New Jersey congressional elections "until the
further order of this court, or until the next decennial
census, whichever is earlier." Order, App. 33a, 34a.

The most recent New Jersey statute establishing con-
gressional districts is P.L. 1982, c.1, signed into law by
the Governor in January 1982. The statute was chal-
lenged in court and in March 1982, a three-judge district
court held it unconstitutional under *Kirkpatrick* v.

Preisler, 394 U.S. 526 (1969), and *White* v. *Weiser*, 412 U.S. 783 (1983), because of its absolute population deviation of 3,674 people (0.6984%). *Daggett* v. *Kimmelman*, 535 F.Supp. 978, 983 (D.N.J. 1982). Justice Brennan stayed the district court's order and the 1982 congressional elections were held under the districts established by the New Jersey statute.

Thereafter, this Court affirmed the judgment of the district court on the sole ground that the population deviations embodied in the statute were too great:

> [I]t was unnecessary for the District Court to rest its finding on the existence of alternative plans with radically different political effects. As in *Kirkpatrick*, "resort to the simple device of transferring entire political subdivisions of known population between contiguous districts would have produced districts much closer to numerical equality." Starting with [P.L. 1982, c.1] itself and the census data available to the Legislature at the time it was enacted, one can reduce the maximum population deviation of the plan [from 0.6984% to 0.449%] merely by shifting a handful of municipalities from one district to another.

—— U.S., at ——, 103 S.Ct., at 2662-2663 (citations omitted). In a footnote, the Court detailed some specific shifts that would accomplish the reduction mentioned, at the same time noting that it had not "prejudge[d] the validity" of any such plan. *Id.*, at —— n.10, 103 S.Ct. at 2663 n.10.

On remand, the district court (by order of December 19, 1983, App. 31a) once again declared P.L. 1982, c.1, unconstitutional under Article I, section 2 of the Constitution, and gave the Legislature and Governor until February 3, 1984 to adopt a constitutionally valid congressional districting plan. In the event that no such plan was adopted, it ordered the parties to exchange witnesses lists by January 31 and to make their proposed witnesses

available for deposition during the period from January 31 through February 6. A hearing was scheduled for February 7, 1984.

The New Jersey Legislature acted promptly to comply with the district court's order. State Senator Lynch had introduced S. 3564, which made the changes suggested by this Court in Footnote 10 and additional modifications in order to reduce the maximum deviation from 3,764 people to 67—less than *one-fiftieth* the original deviation, and so far as appellants are aware, less than any congressional redistricting plan enacted by any legislature in the country.[1] S. 3564 was approved by both Houses of the New Jersey Legislature, but was vetoed by the Governor. Consequently, the State did not meet the district court's deadline and a hearing on remedies was held on February 7.

Eight plans were presented to the district court at the hearing.

The intervening defendants—the Democratic congressional delegation, the Speaker of the New Jersey Assembly, and the President of the New Jersey Senate—presented three plans, all variations on a single theme. Plan A was S. 3564, previously approved by both Houses of the New Jersey Legislature but vetoed by the Governor. As the district court found, it was "virtually identical" to P.L. 1982, c.1, the most recently enacted statute governing New Jersey congressional districts, except that it moved a few municipalities and reduced the overall deviation from 3,746 people to 67. App. 7a. It broke no municipal boundaries. Plan A would require only 9.9% of the State's citizens (726,513 people) to change districts and hence familiarize themselves with new candidates for the upcoming elections.

Plan B was a minor variation on Plan A. It broke a single municipal boundary, shifting one block in Kearny

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[1] The thirty-one legislatively adopted plans summarized in our brief in *Karcher* v. *Daggett* in this court had deviations ranging from tens of thousands to 95. Brief for Appellants, pp. 22-24.

from the 11th to the 10th District. By this shift, it reduced the overall deviation to 42 people. Opinion, App. 10a. Like Plan A, it shifts fewer than 10% of the state's citizens into new congressional districts.

Finally, at the hearing the State Senate intervenor sought to introduce a third plan ("Plan C"). The district court refused to admit the plan because it was not interested in further "fine tuning" to reduce the deviations in any of the submitted plans. Hearing Tr. 58-60, quotation at 60. Plan C was also based on P.L. 1982, c.1. Like Plan B, it broke a single municipality by shifting one block in Kearny. In addition, however, it moved several other municipalities, and was thus able to reduce the overall deviation to 17 people, the smallest of any plan presented to the district court before it reached its decision.[2]

The Governor presented two plans, both of which had been rejected by the Legislature. Each plan was constructed from entire municipalities. Like Plan A, the "Zimmer plan" had an overall deviation of 67 people. The other—the "Hagedorn plan"—had an overall deviation of 60 people. Opinion, App. 10a-11a. Each would place more than 30% of the state's citizens (over 2,300,000 people) in new districts and require them to familiarize themselves with new candidates in order to cast an intelligent ballot in the upcoming primary elections in June and the general elections in November.

The Republican congressional delegation (intervening plaintiffs Forsythe, *et al.*) presented one plan. Unlike all

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[2] The plan as originally presented to the District Court had a deviation of 11 people but, it was later discovered, one municipality was not contiguous. Accordingly, on February 15, 1984, counsel for the Senate intervenors wrote to Judge Fisher explaining this fact and making the technical correction necessary to restore contiguity. Plan C in its final form thus had a deviation of 17 people. It was introduced at the next Senate session as S.1329, along with a further variation (S.1340) that an overall deviation of 11 people, the lowest deviation of any plan of which appellants are aware.

the plans proposed at the previous hearing, and all plans that have passed the New Jersey Legislature or been endorsed by the Governor, the Forsythe plan split two municipalities between districts. It thus obtained an overall deviation of 25 people. Opinion, App. 11a-12a. Under the Forsythe plan, 31.7% of the State's citizens (2,335,308 people) would be placed in new districts and have to familiarize themselves with new candidates in time for the upcoming primary elections in June and the general election in November.[3]

By opinion and order dated February 17, 1984, the district court adopted the Forsythe plan, developed and proposed on behalf of the Republican congressional delegation.

The district court conceded that appellants' proposed Plan A was "virtually identical" to P.L. 1982, c.1, the last enacted statute governing New Jersey congressional districts and the statute under which New Jersey citizens have elected their present congressional delegation. Opinion, App. 7a. However, notwithstanding this Court's repeated admonition that a district court " 'should not preempt the legislative task nor "intrude upon state policy any more than necessary." ' " *Upham* v. *Seamon*, 456 U.S. 37, 41-42 (1982), *quoting White* v. *Weiser*, 412 U.S. 783, 795 (1973), *quoting Whitcomb* v. *Chavis*, 403 U.S. 124, 160 (1971)—and notwithstanding the square holding in *Upham* that a district court errs "when, in choosing between two possible court-ordered plans, it fail[s] to choose that plan which most closely approximate[s] the

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[3] In addition, intervening plaintiff the Taxpayers Political Action Committee submitted two plans at the hearing, both prepared by one C.A. Haverly, an expert in applied mathematics and computer science. The first of these plans (Haverly I) would produce an overall deviation of 1.82%, or about 9,574 people. The second of these plans (Haverly II) was similar, but reduced the deviation to 0.85%, about 4,471 people—slightly more than the deviation found unconstitutional when embodied in P.L. 1982, c.1, at the prior stage of this case. Opinion, App. 6a-7a.

state-proposed plan," 456 U.S., at 42—the district court concluded that it need not defer in any way to P.L. 1982, c.1, and need not in any way attempt to approximate the districts that it created. This the court concluded because P.L. 1982 c.1, had previously been declared unconstitutional, and "[w]e owe no deference to an unconstitutional statute." Opinion, App. 9a.

The district court thus concluded that, with no deference due to the New Jersey statute, it was free to choose among plans in accordance with its own views of what was the best districting policy to be adopted. Opinion, App. 7a-8a. It concluded that the differences in deviation between appellants' Plans A and B, and the Hagedorn and Zimmer plans (67 for Plan A and the Zimmer plan, 60 for the Hagedorn plan, and 42 for Plan B) were "so slight as to be irrelevant." Opinion, App. 11a.[4] It found the Hagedorn and Zimmer plans preferable because they were "considerably more compact" than Plan A. *Id.*

However, the district court concluded that the Forsythe plan was preferable to all of these. It found its slightly lower population deviation (25 people, as opposed to 67, 60, or 42 in the other plans discussed) to be a "great advantage." Opinion, App. 12a.[5] It also found that the Forsythe plan "goes much further than the Hagedorn or Zimmer plans in achieving compact districts." *Id.* The Court did not explain what, if any, test it used to measure compactness. The district court conceded that—unlike the New Jersey statute, unlike the plan approved by the current New Jersey Legislature, and unlike every plan en-

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[4] The court rejected the two Haverly plans because of their large population deviations. Opinion, App. 6a-7a.

[5] The district court did not explain why the difference of 18 people between the Hagedorn plan and Plan B was "irrelevant," but the difference of 17 between the Forsythe plan and Plan B represented a "great improvement."

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dorsed by the Governor of the State—the Forsythe plan splits two municipalities. However, it concluded that this "disadvantage" was "outweighed by the advantages of compactness and population near uniformity." Opinion, App. 12a.[6] Accordingly, it ordered the Forsythe plan into effect "until the further order of this court, or until the next decennial census, whichever is earlier." Order, App. 34a.[7]

THE QUESTION IS SUBSTANTIAL

In its original opinion in this case, the district court struck down the New Jersey redistricting statute solely because it failed adequately to comply with Article I, § 2's requirement of district population equality. *Daggett* v. *Kimmelman*, 535 F.Supp. 978 (D.N.J. 1982). This Court affirmed that judgment on the sole ground that the inequalities in size among districts were too great to stand without justification, and that no adequate justification

In addition, of course, the district court did not discuss the plan presented by the Senate intervenors, which had an absolute deviation of 17 people, even lower than that in the Forsythe plan adopted by the court. It had excluded that plan from evidence, on the ground that it came too late and the court was not interested in further reductions of any of the existing plans. See p. 6 *supra*.

[6] The district court did not explain how it reached this balance of the respective interests. It was not presented with, nor did it seek, any information regarding the administrative difficulties with regard, for example, to the location of polling places, ballot makeup, or the registration of voters if voters within a single New Jersey municipality were divided into two different congressional districts.

[7] The order appears to bar the New Jersey Legislature and Governor—the legitimate lawmaking organs of the State—from enacting and enforcing a new congressional districting plan without specific judicial permission. Such unprecedentedly broad relief was never sought by any part and never discussed in briefs or argument below.

Appellants pointed out this problem to the district court in their application for a stay of the court's order, filed March 7, 1984. At the time of printing—March 14—the order has not been modified.

for the inequalities had been shown. *Karcher* v. *Daggett*, —— U.S. ——, 103 S.Ct. 2653 (1983). On remand, the district court once again declared the New Jersey redistricting statute unconstitutional on the *sole* ground that it violated Article I, § 2. Order, December 19, 1983, App. 31a.

Appellants then presented the district court with plans which were "virtually identical" with the State's own redistricting plan, making only the changes necessary to reduce the population deviation from 3,674 to 67 (or 42, or 17) people. The district court rejected those plans. It chose, instead, a radically different plan more in accord with the district court's taste in district configurations. The district court's plan will shift almost one-third of the State's population—over two and one-third million people—into new districts, requiring them to familiarize themselves with new candidates in order to cast an intelligent ballot in the upcoming primary and general elections. This is clear error:

> The only limits on judicial deference to state apportionment policy [are] the substantive constitutional and statutory standards to which such state plans are subject.

Upham v. *Seamon*, 456 U.S. 37, 42 (1982).

> Despite the existence of Plan B, the District Court ordered implementation of Plan C, which, as conceded by all parties, ignored legislative districting policy and constructed districts solely on the basis of population considerations. The District Court erred in this choice. Given the alternatives, the Court should not have imposed Plan C, with its very different political impact, on the State. *It should have implemented Plan B, which most clearly approximated the reapportionment plan of the state legislature while satisfying constitutional requirements* . . . . *[E]ven if the districts in Plan C can be called more compact, the District Court's preferences*

> *do not override whatever state goals were embodied in S.B. 1 and, derivatively, in Plan B.*

White v. *Weiser*, 412 U.S. 783, 796 (1973) (emphasis added).

Appellants seek summary reversal of this judgment so that the upcoming primary and general elections may take place under a districting scheme as close as possible to the one chosen by the elected representatives of the people of the State.[8] Should this Court take action before the middle of April, this process can go forth without delay. In the alternative, if this Court should conclude that full briefing and oral argument are necessary, appellants are concurrently with this Jurisdictional Statement filing an application for stay with the Circuit Justice, requesting an order that the upcoming elections be held under appellants' Plan A. Such an order would not require the State to devise means to hold elections where voters in the same municipality are assigned to different congressional districts.

I. THE DISTRICT COURT'S ORDER IS DIRECTLY CONTRARY TO *SIMON* v. *DAVIS*, —— U.S. ——, 103 S.CT. 3564 (JULY 6, 1983); *UPHAM* v. *SEAMON*, 456 U.S. 37 (1982), AND *WHITE* v. *WEISER*, 412 U.S. 783 (1973).

The district court gave two justifications for its choice of the Forsythe plan over the plans modeled on the state statute. Both of those justifications have been squarely rejected in decisions of this Court.

A. The population deviations are too small to disregard the State's plan.

The district court found it a "great advantage" that the Forsythe plan had an overall deviation of 25 people

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[8] The filing deadline for primary elections this year is April 26. N.J.S.A. §§ 19:23-8, 19:23-14. The primaries will be held on June 6. N.J.S.A. § 19:23-40.

(in districts containing 526,072), while appellants' Plan
A had a deviation of 67 people, and Plan B a deviation
of 42. Opinion, App. 12a.[9] This Court has already noted,
in this case, that a plan is not invalid "whenever a court
can conceive of minor improvements," *Karcher* v. *Daggett*, —— U.S. at ——, 103 S.Ct. at 2663 n.10 (1983),
and it is hard to conceive of improvements more minor
than this. All of the plans have deviations below 0.02%.
Indeed, the district court rejected an additional plan with
even lower deviations because it was uninterested in further "fine tuning" of the plans. Transcript of Hearing,
p. 60. In any event, however, in *Simon* v. *Davis*, ——
U.S. ——, 103 S.Ct. 3564 (1983), this Court squarely
held that deviations far larger than this are not of constitutional significance.

Simon v. *Davis* involved the congressional redistricting of Pennsylvania. The state law under review involved an overall deviation of 1,215 people (0.2354%),
while competing rejected plans had deviations less than
half that size. The District Court found that "partisan
considerations played a vital role" in the determination
of the final plan, and noted that it could well have designed "districts that were more compact and contiguous." *In re Pennsylvania Congressional Districts Reapportionment Cases*, 567 F. Supp. 1507, 1509, 1510, 1517
(M.D. Pa. 1982). The only justification argued or found
by the District Court for the population deviation was
that political considerations had to be taken into account
in order to get a bill past the partisan legislature. *Id.*
The district court nevertheless upheld the statute and
this Court affirmed.

The Jurisdictional Statement in *Simon* squarely presented the question whether the degree of deviation in the
statute rendered it unconstitutional in light of the availability of other plans with one-third the amount of devia-

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[9] The district court refused to consider a plan, submitted by the
Senate appellants at and after the hearing on February 7, which
would have reduced the deviation to 17. See p. 6, *supra*.

tion, or at least required some additional showing of justification. This Court answered the question in the negative when it summarily affirmed the District Court's judgment. *Simon* v. *Davis*, —— U.S. ——, 103 S.Ct. 3564 (1983).[10] Unless *Simon* v. *Davis* is to be abandoned before its first birthday, the district court was in error in concluding that the difference of 42 people (out of more than 7 million) between the deviations in Plan A and the Forsythe plan—or the difference of 17 people between Plan B and the Forsythe plan—could possibly outweigh the radical departure the Forsythe plan would make from the State's own, duly enacted congressional redistricting statute.[11]

B. Compactness does not justify rejecting the State's plan.

The district court also found it a "great advantage" that the Forsythe plan created "more compact districts" than the alternatives. But this Court has repeatedly held that compactness of districts is a question for legislative and not judicial judgment. *E.g.*, *Simon* v. *Davis*, —— U.S. ——, 103 S.Ct. 3564 (1983); *Gaffney* v. *Cummings*, 412 U.S. 735, 752 n.13 (1973). In *White* v. *Weiser*, 412 U.S. 783, 796 (1973), this Court squarely held that district judges' "preferences" for more compact districts do not "overide whatever state goals were embodied in" in a state redistricting statute and authorize the district court to adopt a plan less like the statute than competing plans.

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[10] This Court subsequently denied a petition for rehearing that alleged the ruling was inconsistent with *Karcher* v. *Daggett*, —— U.S. ——, 103 S.Ct. 2653 (1983). 52 U.S.L.W. 3187 (Sept. 9, 1983). The court below did not mention *Simon* (which was briefed at some length) in its opinion.

[11] If deviations of this size are of remedial significance, the district court should have adopted the plan proposed by the Senate intervenors, which adhered closely to the New Jersey statute and reduced the deviation to 17 people, less than the deviation in the Forsythe plan, and which is far less disruptive than the Forsythe plan would be.

This is precisely what the district court did here, and its action warrants summary reversal.

II. NO ALTERNATIVE GROUNDS CAN SUPPORT THE DISTRICT COURT'S JUDGMENT.

The district court's judgment cannot be supported on any alternative grounds. That court at one point in its opinion appears to read this Court's prior opinion in the case, *Karcher* v. *Daggett*, —— U.S. ——, 103 S.Ct. 2653 (1983), as having *held* that the New Jersey statute, P.L. 1982, c.1, was an unconstitutional gerrymander. Opinion App. 9a. If this was its conclusion, the district court was patently in error. And although the district court repeatedly so characterized the statute, *e.g.*, App. 8a, 9a, 10a, nowhere in the opinion is there the slightest hint of any standard used by the court to support such a characterization—or any factual findings relevant to the question. *Cf.* Fed. R. Civ. P. 52(a). Indeed, on the present record any such findings would have to be upset as clearly erroneous.

A. This Court's prior opinion spoke only to the population deviations.

Responding to appellants' introduction of evidence relevant to the political fairness of the competing plans, the district court stated:

> the present effort to justify [P.L. 1982, c.1] as non-partisan is a thinly veiled effort to relitigate the liability stage of this lawsuit after an affirmance by the Supreme Court of the holding that [P.L. 1982, c.1] is unconstitutional. We have grave doubt whether, consistent with the Supreme Court's judgment, this court is free to permit such relitigation.

Opinion, App. 9a. To the extent that district court read this Court's prior opinion as having held that P.L. 1982, c.1, was an unconstitutional gerrymander and thus could be ignored notwithstanding *White* v. *Weiser* and *Upham* v. *Seamon*, it is blatantly in error. *Karcher* held two

things. First, it held that the statute, with its deviation of 3,674 people, "did not come as nearly as practicable to population equality," and therefore was constitutional only if adequately justified. 103 S.Ct. at 2658-2663 (quotation at 2653). Second, it upheld the district court's prior finding that there was not "any causal relationship" between the asserted justification of protecting minority voting strength and the deviations embodied in the statute. *Id.* at 2663-2665 (quotation at 2665). Even the Justices who spoke to the gerrymandering question— Justice Stevens, concurring, and Justice Powell, in dissent—limited their discussion to the general question of standards and explicitly refrained from determining whether the statute represented a gerrymander. 103 S.Ct. at 2667 (Stevens, J., concurring), 2690 (Powell, J., dissenting).

> B. **The District Court's opinion cannot be read as a finding of unconstitutionality based on compactness or gerrymander.**
>
> 1. *It sets no standards.*

Except insofar as it erroneously reads this Court's prior opinion in *Karcher* as holding P.L. 1982, c.1 (and hence, the derivative plans presented below by appellants) as an unconstitutional gerrymander, the district court's opinion cannot plausibly be read as embodying an independent judgment on that question. If it does embody such a judgment, it cannot stand.

Most important, except for occasional epithets, there is *no* mention or discussion of *any* standard applied by the district court to determine whether P.L. 1982, c.1 (or any other plan) represented an unconstitutional gerrymander. It is impossible to imagine that three federal judges, dealing with a question as difficult and delicate as that of gerrymandering, would reach a judgment without even hinting at the standards they were applying to reach it.

For gerrymandering, as this Court well knows, is neither a simple question nor an obvious one. No human

legislature could pass a districting bill without some
thought to its political impact. Thus this Court last Term,
in *Simon* v. *Davis*, —— U.S. —— 103 S.Ct. 3564 (1983),
squarely held that a redistricting plan was not unconstitu-
tional when, as found by the District Court, "political con-
siderations" played a part in the legislature's choice of
that plan over other plans that were considerably more
compact and embodied substantially smaller population
deviations.[12] "The reality is that districting inevitably
has *and is intended to have* substantial political conse-
quences." *Gaffney* v. *Cummings*, 412 U.S. 735, 753
(1973) (emphasis supplied). This Court in *Gaffney* de-
cried as "politically mindless" the suggestion that "those
who redistrict and reapportion should work with census,
not political data and achieve population equality without
regard for political impact." *Id.* Thus, the standard for
unconstitutional gerrymandering must be something more
than whether the proponents of a particular bill hoped to
obtain some political objection from its passage. If the
district court applied any standard whatsoever, its conclu-
sion as to the standard applied is wholly hidden from
view.[13]

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[12] Based on the census data available to the legislature at the
time, the bill under review in *Simon* had an overall deviation of
1215 persons; other bills before the Legislature had deviations less
less than one-quarter that size. "[P]artisan considerations played
a vital role in the proposed districting plan. Some were drawn to
give a particular party a hoped for advantage in the forthcoming
election, or to match two incumbents from the same party against
each other." More compact districts could have been designed.
Nevertheless, the statute was upheld, and this Court affirmed over
a direct claim of unconstitutional gerrymandering in the Jurisdic-
tional Statement. *In re Pennsylvania Congressional District Re-
apportionment Cases*, 567 F.Supp. 1507, 1509, 1510, 1517 (M.D. Pa.
1982), *affirmed per curiam* sub nom. *Simon* v. *Davis*, —— U.S.
——, 103 S.Ct. 3564 (1983).

[13] If the district court's opinion is read as making an independent
finding of gerrymandering, it is in clear violation of Fed. R. Civ. P.
52(a), which, in order to facilitate appellate review, requires the

2. If the District Court found a gerrymander, the record does not support it.

Despite more than two years of litigation and frequent repetition of the epithet "gerrymander," plaintiffs have not yet brought forth a single scrap of evidence designed to show that P.L. 1982, c.1, and hence the derivative plans urged by appellants, discriminate against *any* political group. At least some evidence of this kind is absolutely essential if resolution of gerrymandering claims is to be anything more than a debate over esthetics by parties— and judges—whose views on modern art are no part of the Constitution of the United States. For "attractiveness has never been held to constitute an independent federal constitutional requirement for state legislative districts," *Gaffney* v. *Cummings*, 412 U.S. 735, 752 n.13 (1973), or congressional districts either.

In these matters, appearance can be misleading—or unavoidable. For example, Justice Stevens in concurrence criticized the Fifth District because it stretched "from the New York suburbs to the rural upper reaches of the Delaware River," and also because it "contains segments of at least seven countries." 103 S.Ct., at 2676. Yet the Fifth District ordered by the district court *also* stretches from the New York suburbs to the upper reaches of the Delaware.[14] And although the district court's Fifth District is somewhat more compact, this is achieved by turning the Twelfth District into a bloated, five-fingered hand, that, like the old Fifth, "contains segments of at least seven counties." See App. 26a-27a. The point is simple: although oddly-shaped districts may be *relevant* to the question of gerrymandering, they cannot be the ending point of the inquiry. For alleged gerrymandering to be judi-

court to "find the facts specially and state separately its conclusions of law thereon." See *Withrow* v. *Larkin*, 421 U.S. 35, 44-46 (1975).

[14] The district court's district comes closer to New York by running farther down the Hudson River, and does not extend as far down the Delaware.

cially cognizable, before a state statute is held unconstitutional on that ground there must be *some* plausible showing that "an identifiable political group" has had its voting strength "diluted," 103 S.Ct., at 2672 (Stevens, J., concurring), or that the plan "invidiously discriminated against a racial or political group," *id.*, at 2687 (White, J., joined by Burger, C.J., Powell, and Rehnquist, JJ., dissenting), or that the plan has the "effect of substantially disenfranchising identifiable groups of voters," *id.*, at 2689 (Powell, Jr., dissenting). Plaintiffs have had more than two years to make such a showing. They have not even attempted to do so.

Nor could they do so. For P.L. 1982, c.1, and hence the derivative plans relied on by appellants, do not unconstitutionally dilute the votes by Republicans or anyone else.

First, any such claim is belied by the results of the 1982 congressional elections. In those elections, fourteen incumbents ran against fourteen challengers. Thirteen incumbents won. The sole incumbent who lost his seat was Representative Hollenbeck, a Republican. However, his loss can hardly be ascribed to a "gerrymandered" district. He lost "many municipalities . . . that he had represented in his old district and had carried in previous elections, and by margins comparable to those by which he lost in the new part of the district." Affidavit of Thomas E. Mann, App. 40a.

Second, the plan proposed by appellants (and hence P.L. 1982, c.1, from which it is derived) is politically fair under standard tests used by political scientists. Appellants presented an affidavit of Dr. Thomas Mann, Executive Director of the American Political Science Association. Appendix D.[15] Dr. Mann examined voting patterns in the 1978, 1980, and 1982 congressional elections; the 1981 and 1983 state Senate elections; the 1981 and 1983

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[15] Plaintiffs were offered the opportunity to depose Mr. Mann but declined.

state Assembly elections; the 1980 presidential election; the 1981 gubernatorial election; and and the 1982 United States Senate election. "Using the test of fairness devised by Backstrom, *et al.* (*Minnesota Law Review*, vol. 62 (1978), 1121-1159), that the majority party, when it has received a bare majority of the statewide vote, be in a majority in a bare majority of the districts, I conclude that [appellants' Plan A] is fair." Mann Affidavit, ¶ 10, App. 38a (referring to test under congressional and state Senate and Assembly elections). "[T]he district results under [appellants' Plan A] fairly reflect the statewide results, and neither party is prevented from winning a majority of districts when it achieves a statewide majority of votes." Mann Affidavit, ¶ 10, App. 39a (referring to test under presidential, gubernatorial, and U.S. Senate elections).[16]

In two years of opportunity and three hearings in two courts, plaintiffs have consistently argued that P.L. 1982, c.1, and appellants' proposed derivative plans, represent an unconstitutional gerrymander. In two years of opportunity and three hearings in two courts they have not presented a shred of evidence to show that P.L. 1982, c.1, or any of appellants' proposed plans, discriminates in any way against any group. The district court referred to no such evidence. There is none. If this Court should conclude that the district court's opinion represents a finding that P.L. 1982, c.1, and its derivative plans, are an unconstitutional gerrymander, summary reversal is warranted on that ground as well.

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[16] The district court expressed some doubt that it was even free to consider Dr. Mann's evidence. It dismissed the statements regarding presidential, U.S. senatorial, and gubernatorial elections as not "of any real relevance" to congressional elections. It did not mention Dr. Mann's conclusions based on the congressional elections. Opinion, App. 9a-10a.

Dr. Mann was the *only* expert whose evidence was presented by *any* party on the question of gerrymandering. The election data appears in Appendix E, *infra*.

III. THE DISTRICT COURT'S ORDER IS TOO BROAD.

The district court ordered

> that primary elections and elections for members of
> the House of Representatives shall be conducted, in
> New Jersey, until the further order of this court, or
> until the next decennial census, whichever is earlier,
> from the single member districts set forth in the
> Opinion filed herewith.

Order, App. 34a.

The order is too broad. It denies the Governor and
Legislature of the State of New Jersey the power, without
judicial permission, to enact a new redistricting statute
and carry it into effect should they choose to do so. There
is no question that the district court has the power to
order a plan into effect, given that P.L. 1982, c.1, has been
declared unconstitutional and the State has not in the
interim enacted a different plan. However, should the
State do so in the future there is no warrant for ordering
it to return to court before any such plan is put into
effect. A new statute would be *res nova*, and come before
the district court—if challenged at all—with the usual
presumption of constitutionality afforded to statutes. The
State should not be required to obtain judicial permission
in advance of the enforcement of a new statute.

CONCLUSION

The New Jersey redistricting statute, P.L. 1982, c.1,
was declared unconstitutional because of and solely be-
cause of the size of the population deviations embodied in
that plan. There is literally *no* evidence before the dis-
trict court that P.L. 1982, c.1, or any of the derivative
plans relied upon by appellants, discriminates against any
identifiable political or racial group. The district court
referred to no such evidence. Uncontroverted evidence,
establishes that these plans are politically "fair" by anal-
ysis of ten different elections, local and statewide. Appel-

lants presented the district court with plans that were "virtually identical" to P.L. 1982, c.1, and reduced the population deviation from 3,764 to 67, 42, and 17 people.

Nevertheless, the district court adopted a plan, submitted on behalf of the Republican congressional delegation, that violates longstanding state policy by breaking municipal boundaries, deviates grossly from P.L. 1982, c.1, and which will require almost a third of the state's citizens to familiarize themselves with new candidates in the upcoming elections. It did so because of its preference for the shapes embodied in its preferred plan. This judgment warrants summary reversal and a remand to the district court with directions to order implementation of one of the plans proposed by appellants.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 82-297

GEORGE T. DAGGETT,

Plaintiff

v.

IRWIN I. KIMMELMAN, ETC., *et al.*,

Defendants

and

Civil Action No. 82-388

EDWIN B. FORSYTHE, *et al.*,

Plaintiffs,

v.

THOMAS H. KEAN, ETC., *et al.*,

Defendants

JAMES J. FLORIO, *et al.*,

Intervenors.

[Filed Feb. 17, 1984]

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Before:

> GIBBONS, Circuit Judge
> FISHER, Chief District Judge
> BROTMAN, District Judge.

GIBBONS, *Circuit Judge*:

These consolidated cases are before us on remand from the Supreme Court, which on June 22, 1983 affirmed this Court's holding that P.L. 1982, c.1 (codified at N.J. Stat. Ann. § 19:46-5 (West Supp. 1983-84) (hereinafter Feldman Plan), creating districts for the election of members of the House of Representatives from New Jersey, is un-

constitutional, and enjoining the defendant state officers from conducting primary or general congressional elections under its terms.[1] This court's prior order fixed March 22, 1982 as the date for enactment by New Jersey of a new constitutional congressional redistricting plan, and provided that if no such plan was enacted by that date the court would convene to undertake further proceedings. Because the Supreme Court, on March 15, 1982, issued a stay of this court's injunction,[2] the 1982 congressional election took place under the Feldman Plan. The Supreme Court's affirmance of this court's order, however, restored the injunction. On December 19, 1983, this court fixed February 3, 1984 as the date by which New Jersey could enact a constitutional congressional redistricting plan, and February 7, 1984 as the date of a hearing on further proceedings if no such plan was enacted.

On January 5, 1984 the New Jersey Legislature adopted Senate Bill 3564, but that bill was vetoed by Governor Thomas H. Kean, and had insufficient support for reenactment over his veto. Since no legislation was adopted in the time permitted by this court's December 19, 1983 order, we convened on February 7, 1984 and held a hearing on further relief.

At that hearing six separate redistricting proposals were advanced by various parties. No party urged that the next New Jersey congressional election be held on an at-large basis without districts. Instead, the parties unanimously urged that the court select the plan, among those admitted in evidence, which satisfied the constitutional standards for congressional districts, while most nearly satisfying non-constitutional criteria for fair dis-

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[1] Karcher v. Daggett, —— U.S. ——, 103 S. Ct. 2653 (1983), aff'g Daggett v. Kimmelman, 535 F. Supp. 978 (D.N.J. 1982).

[2] Karcher v. Daggett, 455 U.S. 1303 (1982) (Brennan, J., in chambers).

tricting. Thus the parties urged that the court should adopt a remedy similar to that adopted, following the 1970 decennial census, in *David v. Cahill*, 342 F. Supp. 463 (D.N.J. 1972). We note in passing that although the decree in *David v. Cahill* did not so require, the redistricting plan which it adopted was utilized for New Jersey congressional elections until the 1980 decennial census rendered it obsolete.

The population of New Jersey in the 1980 decennial census, as most recently corrected by the Bureau of Census, is 7,365,011. New Jersey is entitled to representation in the House of Representatives by fourteen representatives; one less than under the 1970 decennial census. Thus the ideal congressional district would have a population of 526,072.

Article I, § 2, as interpreted by the Supreme Court, permits only such limited population variances from the standard of equal district population as "are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown." *Karcher v. Daggett*, —— U.S. at ——, 103 S. Ct. at 2658 (quoting *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969)). Moreover, a good-faith effort to achieve absolute equality is not established by producing a redistricting plan with a maximum population deviation "smaller than the predictable undercount in available census data." *Karcher v. Daggett*, —— U.S. at ——, 103 S. Ct. at 2658, 2662. Compare *Daggett v. Kimmelman*, 535 F. Supp. at 983, 985 (Gibbons, J., dissenting). Moreover, once it has been established that a redistricting plan "was not the product of a good-faith effort to achieve population equality," the burden shifts "to the State to prove that the population deviations in its plan were necessary to achieve some legitimate state objective." *Karcher v. Daggett*, —— U.S. at ——, 103 S. Ct. at 2663. Among the policies which may justify some variance are "making districts compact, respecting municipal boundaries, preserving the cores of

prior districts, and avoiding contests between incumbent Representatives." *Id.* In the prior decision of this court we found that the State had failed to carry its burden of justification with respect to the Feldman Plan, and the Supreme Court affirmed that finding as not clearly erroneous. *Id.* at ——, 103 S.Ct. at 2665. Finally, the opinion of the court in *Karcher v. Daggett*, while declining to rely, as a constitutional violation, on the obviously partisan purposes behind the Feldman Plan, recognizes that "[a] federal principle of population equality does not prevent any State from taking steps to *inhibit* gerrymandering, so long as a good-faith effort is made to achieve population equality as well." *Id.* at —— n.6, 103 S.Ct. at 2660 n.6 (emphasis supplied).

While *Karcher v. Daggett* considers what interests may be taken into account by state legislatures in justifying deviations from the ideal of district population equality based on the decennial census, it also provides useful instruction to district courts faced, as we are, with selecting a districting plan because of a failure in the legislative process. We may take into account at least those factors which the Court has recognized as legitimate, namely: making districts compact, preserving municipal boundaries, preserving cores of prior districts, avoiding contests between incumbents, and inhibiting gerrymandering. With those factors in mind we turn to the several plans which have been proposed.

A. The Haverly Plan

Taxpayers Political Action Committee, an intervenor, proposed Exhibit IM-1(a), a plan, and exhibit IM-1(b), a district map, produced at its request by C.A. Haverly, an expert in applied mathmatics and computer science. Haverly's plan, according to his report, was designed with the objective of keeping the maximum population deviation of any district at less than $+/-1\%$, preserving municipal boundaries, maximizing compactness and contigu-

ity, avoiding county fragmentation, and preserving population stability from old to new districts. The Haverly plan, while reasonably attractive in other respects, proposes a population variation between the largest and smallest districts of 1.82%. An alternative version proposes a population variation of .85%. This variation between the largest and smallest districts is larger than any which would occur in the plans proposed by other parties. Since we must make a good-faith effort to maximize population equality, we decline to adopt Exhibit IM-1(a) as a remedy.

B. Senate Bill 3564

The Democratic congressmen, intervenors, urge that the court adopt as a remedy the plan embodied in Senate Bill 3564 which passed the New Jersey Legislature, but was vetoed by Governor Kean. That plan, Exhibit IF-2(c), is reflected in the map, Exhibit D-6. A comparison of Exhibit D-6 with the map of the New Jersey congressional districts resulting from the Feldman Plan reveals that the districts are virtually identical. Some slight changes have been made, by moving municipalities among districts, so as to achieve a low district population of 526,020, and a high of 526,087, or a maximum variation of 67 persons and an absolute mean deviation of 11.50 persons. This plan produces a relative overall range of .01273%, and a relative mean deviation of .00218%.

We need not consider how Exhibit IF-2(c) would have fared had it been validly enacted by the State of New Jersey. *Compare Karcher v. Daggett,* —— U.S. ——, 103 S.Ct. at 2667-78 (Stevens, J., concurring) *with id.* —— U.S. at ——, 103 S.Ct. at 2687-90 (Powell, J., dissenting). Senate Bill 3564 is proposed to us as a remedy. As such it does not meet the criteria which we consider relevant to the exercise of our discussion in devising a remedy. First, it does not achieve as small an overall or mean deviation as other plans which are in evidence. While it does succeed in preserving municipal boundaries,

the population variances it would maintain are not main-
tained for that purpose, but rather for the purpose of
preserving, as nearly as possible, the districts erected in
the Feldman Plan. While Exhibit IF-2(c) preserves the
cores of the districts established in the Feldman Plan,
those districts are unconstitutional. The plan in Exhibit
IF-2(c) has little if any relationship to the cores of dis-
tricts established under *David v. Cahill*, and even less
relationship to the cores of the last valid New Jersey
congressional reapportionment enactment. Exhibit IF-
2(c) avoids contests between incumbents. These contests
are avoided, however, only because some incumbents
moved in 1982 or ran outside their home district, thereby
managing to win elections from unconstitutional districts.
The most glaring defects in the Feldman Plan, however,
are carried forward in Exhibit IF-2(c). These are an
obvious absence of compactness, and an intentional gerry-
mander in favor of certain Democratic representatives.

The Democratic congressmen intervenors urge that we
must, as a matter of law, adopt Exhibit IF-2(c) as a
remedy. Their legal position in this regard is predicated
on certain language in *White v. Weiser*, 412 U.S. 783
(1973), which is said to require that result. In that case
the Supreme Court held that a district court should, in
choosing among remedial plans, choose the plan which
most closely approximates that selected by a state legis-
lature. *Id.* at 795. The policy dispute in *White v. Weiser*
among the competing plans was over the district court's
rejection of a state policy of avoiding contests among in-
cumbents. The Feldman Plan did not implement such a
policy; quite the opposite. It was designed to produce
contests among certain Republican incumbents. Moreover,
White v. Weiser teaches that "the District Court should
defer to state policy in fashioning relief only where that
policy is consistent with constitutional norms and is not
itself vulnerable to legal challenge." 412 U.S. at 797.
The State policy embodied in the Feldman Plan was to
deviate from the norm of population equality for the

patently discernable purpose of partisan advantage. That policy was not merely vulnerable to legal challenge; the challenge succeeded. We owe no deference to an unconstitutional state statute.

The proponents of the plan in Exhibit IF-2(c) urge that in fact the Feldman Plan was not a partisan gerrymander, but only a neutral effort by the legislature and the former Governor to provide for congressional representation roughly equivalent to the voting strength of the Democratic and Republican parties in the state. In support of that contention, they have produced computer generated analyses of the results, in each of the districts proposed in Exhibit IF-2(c), of several statewide elections. The inference they would have us draw from these analyses is that the districts established by the Feldman Plan were in fact non-partisan.

For several reasons we decline the invitation to endorse as a remedy the basic districts set forth in the Feldman Plan. First, the present effort to justify those districts as non-partisan is a thinly veiled effort to relitigate the liability stage of this lawsuit after an affirmance by the Supreme Court of the holding that the Feldman Plan is unconstitutional. We have grave doubt whether, consistent with the Supreme Court's judgment, this court is free to permit such relitigation. Assuming we were free to consider the evidence of hypothetical results, in each district, of elections other than those for Congress, we would not find that evidence of any real relevance. While it is true that congressional elections are frequently affected by the same issues that influence the outcome of Presidential and Senatorial contests, the patent reality is that they are strongly influenced by the more direct relationship of a Representative with the voters in his own district. Thus the fact that a district may have voted in favor of a senatorial or presidential candidate of one party is hardly a strong predictor of the outcome of a congressional race. The case of a gubernatorial election,

which may turn on statewide rather than national or district issues, is even less relevant.

A final contention advanced in favor of Exhibit IF-2(c) is that in the election held under the Feldman Plan all Republican incumbents save one survived the election. With the benefit of such hindsight we are asked to adhere as closely as possible to the districts established in the 1982 legislation. The Supreme Court, however, had the benefit of the same hindsight when, on June 22, 1983, it decided *Karcher v. Daggett*. The Court undoubtedly was as aware as we are of the unique set of circumstances surrounding that election, such as Representative Fenwick's race for the Senate, which permitted Congressman Courter to run unopposed in the district to which he moved, and Congressman Rinaldo's decision to run outside his home district, which produced results unexpected by those responsible for enacting the Feldman Plan. That statute's unconstitutionality cannot be disregarded merely because its intended partisan results were not fully realized.

Thus we conclude that Exhibit IF-2(c), embodying the provisions of Senate Bill 3564, is not an appropriate remedy for the unconstitutionality of the Feldman Plan. For the same reasons, we conclude that a modification of that plan, which would shift one census block from the proposed eleventh to the proposed tenth district, thereby reducing the variation from 67 to 42 persons, is also an inappropriate remedy.

C. The Hagedorn and Zimmer Plans

The executive branch defendants propose for our consideration two redistricting plans which were introduced, but not enacted, in the New Jersey legislature. The first, introduced by Senator Hagedorn as Senate Bill 1111, is reflected in the district map Exhibit D.7. The second, introduced by Assemblyman Zimmer, as Assembly Bill 839, is reflected in the district map Exhibit D.9. The

Hagedorn map produces a high population district of 526,115 and a low population district of 526,055, or a maximum variation of 60 persons, and an absolute mean deviation of 11.50 persons. The relative overall range is .01140% and the relative mean deviation is .00218%. The Zimmer map produces a district with a high population of 526,087 and a district with a low population of 526,020, or a maximum variation of 67 persons, and an absolute mean deviation of 10.92 persons. The Zimmer plan's relative overall range is .01273% and its relative mean deviation is .00207%. A comparison of these deviation figures with those that would result from the adoption of Senate Bill 3564 shows that the numerical differences are so slight as to be irrelevant.

Since neither the Hagedorn nor the Zimmer plans were enacted, the executive branch defendants do not suggest that they come clothed with any mantle of state policy. The districts reflected in Exhibits D.7 and D.9 are considerably more compact than those in the Feldman Plan, and thus also more compact than those in Senate Bill 3564. Neither splits municipal boundaries, and neither places incumbent representatives in the same district. If the choice were between Senate Bill 3564 and either the Hagedorn or the Zimmer plan, either of the latter two would in our view embody preferable remedial features. And, as between Hagedorn and Zimmer, the slightly lower absolute mean deviation in the Zimmer plan, 10.92 persons, probably would tip the scale in its favor. The Zimmer plan must, however, be compared with one remaining proposal.

D. The Forsythe, et al. Plan

The original plaintiffs in one of these consolidated cases, No. 82-388, were Republican candidates in the 1982 primary congressional elections. All but one of them [3] have

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[3] We are advised that Congressman Courter, a plaintiff in No. 82-388, has terminated the authority of the firm of Hellring, Linde-

proposed a redistricting plan. That plan is embodied in Exhibit P-1(a) and (b), and the map depicting the proposed districts is Exhibit P-1(c). The plan shown on Exhibit P-1(c) produces a high population district of 526,087 and a low population district of 526,062, or a maximum variation of only 25 persons, and an absolute mean deviation of 5.9 persons. The relative overall range is .00475% and the relative mean deviation is .00112%. Thus the plan reflected in Exhibit P-1(c) achieves the lowest population deviation of any plan which has been presented. Moreover it goes much further than the Hagedorn or Zimmer plans in achieving compact districts. Like all the plans considered, it avoids placing incumbents in the same district. Unlike any of the others, however, it achieves the extremely low population deviation in part by splitting off certain census tracts from the Essex County municipality of Belleville, and the Hudson County community of Kearny. The plan, in what it proposes as the 10th Congressional District, preserves a congressional district in which a majority of the population is black. No evidence has been offered from which we could find that it is designed to achieve partisan advantage.

The two great advantages of the Exhibit P-1(c) plan, over any of the others, are the achievement of smaller population deviations, and the creation of more compact districts. The only disadvantages which the plan presents is the splitting of two North Jersey municipalities in order to achieve those advantages. We hold that this disadvantage is outweighed by the advantages of compactness and population near uniformity. Thus, among those in evidence, the plan which in our view most nearly fits the appropriate criteria for a court considering a congressional reapportionment plan as a remedy for an unconstitutional reapportionment statute, is that set forth in Exhibits P-1(a) (b) and (c).

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man, Goldstein & Siegal to act on his behalf, and that he disapproves of the submission of the plan in question.

It will therefore be ordered, adjudged and decreed that primary elections and elections for members of the House of Representatives shall be conducted, in New Jersey, until the further order of this court, or until the next decennial census, whichever is later,* from the following single member districts:

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* [By order of the district court dated Mar. 5, 1984, this language was changed to "whichever is earlier."]

1ST CONGRESSIONAL DISTRICT

Burlington County

Maple Shade Township	20,525
Palmyra Borough	7,085
Riverton Borough	3,068

Camden County

Audubon Park Borough	1,274
Barrington Borough	7,418
Bellmawr Borough	13,721
Berlin Borough	5,786
Berlin Township	5,348
Brooklawn Borough	2,133
Camden City	84,910
Chesilhurst Borough	1,590
Clementon Borough	5,764
Collingswood Borough	15,838
Gibbsboro Borough	2,510
Gloucester City	13,121
Gloucester Township	45,156
Haddon Township	15,875
Hi-Nella Borough	1,250
Laurel Springs Borough	2,249
Lawnside Borough	3,042
Lindenwold Borough	18,196
Magnolia Borough	4,881
Mount Ephraim Borough	4,863
Oaklyn Borough	4,223
Pennsauken Township	33,775
Pine Hill Borough	8,684
Pine Valley Borough	23
Runnemede Borough	9,461
Somerdale Borough	5,900
Stratford Borough	8,005
Tavistock Borough	9
Winslow Township	20,034
Woodlynne Borough	2,578

Gloucester County

Clayton Borough	6,013
Deptford Township	23,473
East Greenwich Township	4,144
Greenwich Township	5,404
Harrison Township	3,585
Logan Township	3,078
Monroe Township	21,639
National Park Borough	3,552
Paulsboro Borough	6,944
Swedesboro Borough	2,031
Washington Township	27,878
Wenonah Borough	2,303
West Deptford Township	18,002
Westville Borough	4,786
Woodbury City	10,353
Woodbury Heights Borough	3,460
Woolwich Township	1,129
	526,069

2ND CONGRESSIONAL DISTRICT

Atlantic County

All	194,119

Cape May County

All	82,266

Cumberland County

All	132,866

Gloucester County

Elk Township	3,187
Franklin Township	12,396
Glassboro Borough	14,574
Mantua Township	9,193
Newfield Borough	1,563
Pitman Borough	9,744
South Harrison Township	1,486

Salem County

    All   64,676

                                        526,070

3RD CONGRESSIONAL DISTRICT

Monmouth County

Allenhurst Borough	912
Asbury Park City	17,015
Atlantic Highlands Borough	4,950
Avon-by-the-Sea Borough	2,337
Belmar Borough	6,771
Bradley Beach Borough	4,772
Deal Borough	1,952
Eatontown Borough	12,703
Fair Haven Borough	5,679
Hazlet Township	23,013
Highlands Borough	5,187
Interlaken Borough	1,037
Keansburg Borough	10,613
Keyport Borough	7,413
Little Silver Borough	5,548
Loch Arbour Village	369
Long Branch City	29,819
Manasguan Borough	5,354
Middletown Township	62,574
Monmouth Beach Borough	3,318
Neptune City Borough	5,276
Neptune Township	28,366
Oceanport Borough	5,888
Ocean Township	23,570
Red Bank Borough	12,031
Rumson Borough	7,623
Sea Bright Borough	1,812
Sea Girt Borough	2,650
Shrewsbury Borough	2,962
Shrewsbury Township	995
Spring Lake Borough	4,215
Spring Lake Heights Borough	5,424
South Belmar Borough	1,566
Tinton Falls Borough	7,740

Union Beach Borough	6,354
West Long Branch Borough	7,380

Ocean County

Bay Head Borough	1,340
Brick Township	53,629
Dover Township	64,455
Island Heights Borough	1,575
Lakewood Township	38,464
Lavallette Borough	2,072
Mantoloking Borough	433
Point Pleasant Beach Borough	5,415
Point Pleasant Borough	17,747
Seaside Heights Borough	1,802
South Toms River Borough	3,954
	526,074

4TH CONGRESSIONAL DISTRICT

Burlington County

Bordentown City	4,441
Bordentown Township	7,170
Burlington City	10,246
Burlington Township	11,527
Chesterfield Township	3,867
Eastampton Township	3,814
Fieldsboro Borough	597
Florence Township	9,084
Mansfield Township	2,523
Springfield Township	2,691
Westampton Township	3,383

Mercer County

East Windsor Township	21,041
Ewing Township	34,842
Hamilton Township	82,801
Hightstown Borough	4,581
Hopewell Borough	2,001
Hopewell Township	10,893
Lawrence Township	19,724

Pennington Borough	2,109
Trenton City	92,124
Washington Township	3,487

Middlesex County

Jamesburg Borough	4,114
Monroe Township	15,858
Plainsboro Borough	5,605

Monmouth County

Allentown Borough	1,962
Brielle Borough	4,068
Colts Neck Township	7,888
Englishtown Borough	976
Farmingdale Borough	1,348
Freehold Borough	10,020
Freehold Township	19,202
Holmdel Township	8,447
Howell Township	25,065
Manalapan Township	18,914
Marlboro Township	17,560
Millstone Township	3,926
Roosevelt Borough	835
Upper Freehold Township	2,750
Wall Township	18,952

Ocean County

Jackson Township	25,644
	526,080

5TH CONGRESSIONAL DISTRICT

Bergen County

Allendale Borough	5,901
Alpine Borough	1,549
Bergenfield Borough	25,568
Closter Borough	8,164
Cresskill Borough	7,609
Demarest Borough	4,963
Dumont Borough	18,334

Emerson Borough	7,793
Glen Rock Borough	11,497
Harrington Park Borough	4,532
Haworth Borough	3,509
Hillsdale Borough	10,495
Hohokus Borough	4,129
Mahwah Township	12,127
Midland Park Borough	7,381
Montvale Borough	7,318
Northvale Borough	5,046
Norwood Borough	4,413
Oakland Borough	13,443
Old Tappan Borough	4,168
Oradell Borough	8,658
Paramus Borough	26,474
Park Ridge Borough	8,515
Ramsey Borough	12,899
Ridgewood Village	25,208
Rivervale Township	9,489
Rochelle Park Township	5,603
Rockleigh Borough	192
Saddle River Borough	2,763
Tenafly Borough	13,552
Upper Saddle River Borough	7,958
Waldwick Borough	10,802
Washington Township	9,550
Westwood Borough	10,714
Woodcliff Lake Borough	5,644
Wyckoff Borough	15,500

Passaic County

Bloomingdale Borough	7,867
Haledon Borough	6,607
Hawthorne Borough	18,200
North Haledon Borough	8,177
Ringwood Borough	12,625
Wanague Borough	10,025
West Milford Township	22,750

Sussex County

Andover Borough	892
Andover Township	4,506

Branchville Borough	870
Frankford Township	4,654
Franklin Borough	4,486
Fredon Township	2,281
Hamburg Borough	1,832
Hardyston Township	4,553
Hopatcong Borough	15,531
Lafayette Township	1,614
Montague Township	2,066
Newton Town	7,748
Ogdensburg Borough	2,737
Sandyston Township	1,485
Sparta Township	13,333
Stanhope Borough	3,638
Sussex Borough	2,418
Vernon Township	16,302
Walpack Township	150
Wantage Township	7,268
	526,075

6TH CONGRESSIONAL DISTRICT

Middlesex County

Carteret Borough	20,598
Edison Township	70,193
Highland Park Borough	13,396
Metuchen Borough	13,762
New Brunswick City	41,442
North Brunswick Township	22,220
Old Bridge Township	51,515
Perth Amboy City	38,951
Sayreville Borough	29,969
South Amboy	8,322
South River Borough	14,361
Woodbridge Township	90,074

Monmouth County

Aberdeen Township	17,235
Matawan Borough	8,837

Union County

Linden City	37,836
Rahway City	26,723
Roselle Borough	20,641
	526,075

7TH CONGRESSIONAL DISTRICT

Essex County

Millburn Township	19,543

Middlesex County

Dunellen Borough	6,593
Middlesex Borough	13,480

Somerset County

Bound Brook Borough	9,710
Bridgewater Township	29,175
Green Brook Township	4,640
Manville Borough	11,278
North Plainfield Borough	19,108
Warren Township	9,805
Watchung Borough	5,290

Union County

Berkley Heights Township	12,549
Clark Township	16,699
Cranford Township	24,573
Elizabeth City	106,201
Fanwood Borough	7,767
Garwood Borough	4,752
Kenilworth Borough	8,221
Mountainside Borough	7,118
New Providence Borough	12,426
Plainfield City	45,555
Roselle Park Borough	13,377
Scotch Plains Township	20,774
Springfield Township	13,955
Summit City	21,071

Union Township	50,184
Westfield Town	30,447
Winfield Township	1,785
	526,076

8TH CONGRESSIONAL DISTRICT

Bergen County

Franklin Lakes Borough	8,769

Essex County

Belleville Town (part)

Ward #1—District #2	1,146
Ward #1—District #3	1,112
Ward #1—District #6	926
Ward #1—District #7	976
Ward #1—District #8	2,453
Ward #1—District #9	1,413
Ward #1—District #10	2,547
Ward #1—District #11	2,000
Ward #1—District #12	1,349
Ward #2	16,566
Bloomfield Town	47,792
Glen Ridge Borough	7,855
Montclair Town	38,321
Nutley Town	28,998

Morris County

Riverdale Borough	2,530

Passaic County

Clifton City	74,388
Little Falls Township	11,496
Passaic City	52,463
Paterson City	137,970
Pompton Lakes Borough	10,660
Prospect Park Borough	5,142
Totowa Borough	11,448

Wayne Township	46,474
West Paterson Borough	11,293
	526,087

9TH CONGRESSIONAL DISTRICT

Bergen County

Bogota Borough	8,344
Carlstadt Borough	6,166
Cliffside Park Borough	21,464
East Rutherford Borough	7,849
Edgewater Borough	4,628
Elmwood Park Borough	18,377
Englewood City	23,701
Englewood Cliffs Borough	5,698
Fair Lawn Borough	32,229
Fairview Borough	10,519
Fort Lee Borough	32,449
Garfield City	26,803
Hackensack City	36,039
Hasbrouck Heights Borough	12,166
Leonia Borough	8,027
Little Ferry Borough	9,399
Lodi Borough	23,956
Lyndhurst Township	20,326
Maywood Borough	9,895
Moonachie Borough	2,706
New Milford Borough	16,876
North Arlington Borough	16,587
Palisades Park Borough	13,732
Ridgefield Borough	10,294
Ridgefield Park Village	12,738
River Edge Borough	11,111
Rutherford Borough	19,068
Saddle Brook Township	14,084
South Hackensack Township	2,229
Teaneck Township	39,007
Teterboro Borough	19
Wallington Borough	10,741
Wood-Ridge Borough	7,929

Hudson County

Kearny Town (part)	
East Newark Borough	1,923
Ward #1—District #1	962
Ward #1—District #2	1,109
Ward #1—District #6	1,019
Ward #3	8,578
Ward #4—District #5	836
Ward #4—District #6	1,281
Ward #4—District #7	1,483
Secaucus Town	13,719
	526,066

10TH CONGRESSIONAL DISTRICT

Essex County

Belleville Town (part)	
Wart #1—District #1	1,414
Ward #1—District #4	1,550
Ward #1—District #5	1,915
East Orange City	77,878
Irvington Town	61,493
Newark City	329,248
Orange City	31,136

Union County

Hillside Township	21,440
	526,074

11TH CONGRESSIONAL DISTRICT

Essex County

Caldwell Borough	7,624
Cedar Grove Township	12,600
Essex Fells Borough	2,363
Fairfield Borough	7,987
Livingston Township	28,040
Maplewood Township	22,950

North Caldwell Borough | 5,832
Roseland Borough | 5,330
South Orange Village Township | 15,864
Verona Borough | 14,166
West Caldwell Borough | 11,407
West Orange Town | 39,510

Morris County

Boonton Town | 8,620
Boonton Township | 3,273
Butler Borough | 7,616
Chatham Borough | 8,537
Chester Borough | 1,433
Chester Township | 5,198
Denville Township | 14,380
Dover Town | 14,681
East Hanover Township | 9,319
Florham Park Borough | 9,359
Hanover Township | 11,846
Jefferson Township | 16,413
Kinnelon Borough | 7,770
Lincoln Park Borough | 8,806
Madison Borough | 15,357
Mendham Borough | 4,899
Mendham Township | 4,488
Mine Hill Township | 3,325
Montville Township | 14,290
Mountain Lakes Borough | 4,153
Mount Arlington Borough | 4,251
Mount Olive Township | 18,748
Netcong Borough | 3,557
Parsippany-Troy Hills Township | 49,868
Pequannock Township | 13,776
Randolph Township | 17,828
Rockaway Borough | 6,852
Rockaway Township | 19,850
Roxbury Township | 18,878
Victory Gardens Borough | 1,043
Wharton Borough | 5,485

Sussex County

| Byram Township | 7,5∪2 |
| Green Township | 2,450 |

Warren County

Allamuchy Township	2,560
Frelinghuysen Township	1,435
Independence Township	2,829
Liberty Township	1,730
	526,078

12TH CONGRESSIONAL DISTRICT

Hunterdon County

| All | 87,361 |

Mercer County

Princeton Borough	12,035
Princeton Township	13,683
West Windsor Township	8,542

Middlesex County

Cranbury Township	1,927
East Brunswick Township	37,711
Helmetta Borough	955
Milltown Borough	7,136
Piscataway Township	42,223
South Brunswick Township	17,127
South Plainfield Township	20,521
Spotswood Borough	7,840

Morris County

Chatham Township	8,883
Harding Township	3,236
Morris Township	18,486
Morris Plains Borough	5,305
Morristown Town	16,614
Passaic Township	7,275
Washington Township	11,402

Somerset County

Bedminster Township	2,469
Bernards Township	12,920
Bernardsville Borough	6,715
Branchburg Township	7,846
Far Hills Borough	677
Franklin Township	31,358
Hillsborough Township	19,061
Millstone Borough	530
Montgomery Township	7,360
Peapack Gladstone Borough	2,038
Raritan Borough	6,128
Rocky Hill Borough	717
Soverville Borough	11,973
South Bound Brook Borough	4,331

Sussex County

Hampton Township	3,916
Stillwater Township	3,887

Warren County

Alpha Borough	2,644
Belvidere Town	2,475
Blairstown Township	4,360
Franklin Township	2,341
Greenwich Township	1,738
Hackettstown Town	8,850
Hardwick Township	947
Harmony Township	2,592
Hope Township	1,468
Knowlton Township	2,074
Lopatcong Township	4,998
Mansfield Township	5,780
Oxford Township	1,659
Pahaquarry Township	26
Phillipsburg Town	16,647
Pohatcong Township	3,856
Washington Borough	6,429

Washington Township	4,243
White Township	2,748
	526,063

13TH CONGRESSIONAL DISTRICT

Burlington County

Bass River Township	1,344
Beverly City	2,919
Cinnaminson Township	16,072
Delanco Township	3,730
Delran Township	14,811
Edgewater Park Township	9,273
Evesham Township	21,508
Hainesport Township	3,236
Lumberton Township	5,236
Medford Lakes Borough	4,958
Medford Township	17,622
Moorestown Township	15,596
Mount Holly Township	10,818
Mount Laurel Township	17,614
New Hanover Township	14,258
North Hanover Township	9,050
Pemberton Borough	1,198
Pemberton Township	29,720
Riverside Township	7,941
Shamong Township	4,537
Southhamption Township	8,808
Tabernacle Township	6,236
Washington Township	808
Willingboro Township	39,912
Woodland Township	2,285
Wrightstown Borough	3,031

Camden County

Audubon Borough	9,533
Cherry Hill Township	68,785
Haddonfield Borough	12,337
Haddon Heights Borough	8,361
Merchantville Borough	3,972

Voorhees Township	12,919
Waterford Township	8,126

Ocean County

Barnegat Township	8,702
Barnegat Light Borough	619
Beach Haven Borough	1,714
Beachwood Borough	7,687
Berkeley Township	23,151
Eagleswood Township	1,009
Harvey Cedars Borough	363
Lacey Township	14,161
Lakehurst Borough	2,908
Little Egg Harbor Township	8,483
Long Beach Township	3,488
Manchester Township	27,987
Ocean Gate Borough	1,385
Ocean Township	3,731
Pine Beach Borough	1,796
Plumsted Township	4,674
Seaside Park Borough	1,795
Ship Bottom Borough	1,427
Stafford Township	10,385
Surf City Borough	1,571
Tuckerton Borough	2,472
	526,062

14TH CONGRESSIONAL DISTRICT

Hudson County

Bayonne City	65,047
Guttenberg Town	7,340
Harrison Town	12,242
Hoboken City	42,460
Jersey City	223,532
Kearny Town (part)	
Ward #1—District #3	1,045
Ward #1—District #4	1,245
Ward #1—District #5	1,103
Ward #2	10,506

Ward #4—District #1	1,174
Ward #4—District #2	1,673
Ward #4—District #3	846
Ward #4—District #4	1,323
Ward #4—District #8	1,552
North Bergen Township	47,019
Union City	55,593
Weehawken Township	13,168
West New York Town	39,194
	526,062

31a

APPENDIX B

[Caption Omitted in Printing]

ORDER ON MANDATE

[Filed Dec. 19, 1983]

This matter having been heard by the three-judge court on February 19 and 26, 1982, and plaintiffs' applications for preliminary and permanent injunctive relief having been consolidated pursuant to rule 65(a) of the Federal Rules of Civil Procedure, and the court having considered the proofs adduced by the original and intervening parties and the oral argument and submission of counsel, and the court having filed its written opinion on March 3, 1982, and good cause appearing therefor, it is, on this 19th day of December, 1983,

ORDERED, ADJUDGED AND DECREED that judgment be, and it hereby is, entered in favor of plaintiffs and against defendants and defendants-intervenors as provided herein; and it is further

ORDERED, ADJUDGED, AND DECREED that that apportionment of congressional districts constituted by this court in *David v. Cahill* be, and it hereby is, declared unconstitutional in light of the 1980 decennial census; and it is further

ORDERED, ADJUDGED AND DECREED that P.L. 1982, c.1 of the State of New Jersey be, and it hereby is, declared unconstitutional as violative of plaintiffs' rights under Article I, § 2 of the Constitution of the United States; and it is further

ORDERED, ADJUDGED AND DECREED that defendants Thomas H. Kean, Irwin Kimmelman and Jane Burgio be, and they hereby are, preliminarily and permanently enjoined from conducting primary or general

congressional elections under the terms of P.L. 1982, c.1; and it is further

ORDERED, ADJUDGED AND DECREED that all counterclaims and crossclaims asserted by the intervenors herein be, and they hereby are, dismissed; and it is further

ORDERED, ADJUDGED AND DECREED that the New Jersey Legislature and Governor be, and they hereby are granted until February 3, 1984, to enact a new constitutional plan for reapportionment; and it is further

ORDERED, ADJUDGED AND DECREED that if the Legislature does not enact a new constitutional plan by February 3, 1984, this court will convene on February 7, 1984, to undertake further proceedings; and it is further

ORDERED, ADJUDGED AND DECREED that by January 31, 1984, the parties will exchange lists of witnesses and any witness not listed will not be permitted to testify; and it is further

ORDERED, ADJUDGED AND DECREED that the parties hold witnesses available for taking of depositions from January 31, 1984, through February 6, 1984.

> /s/ John J. Gibbons
> JOHN J. GIBBONS
> Judge
> United States Court of Appeals
>
> /s/ Clarkson S. Fisher
> CLARKSON S. FISHER
> Chief Judge
> United States District Court
>
> /s/ Stanley S. Brotman
> STANLEY S. BROTMAN
> Judge
> United States District Court

[Caption Omitted in Printing]

ORDER

[Filed Feb. 17, 1984]

It is on this 17th day of Feb., 1984

ORDERED, ADJUDGED and DECREED that primary elections and elections for members of the House of Representatives shall be conducted, in New Jersey, until the further order of this court, or until the next decennial census, whichever is later, from the single member districts set forth in the Opinion filed herewith.

/s/ John J. Gibbons
JOHN J. GIBBONS
Circuit Judge

/s/ Clarkson S. Fisher
CLARKSON S. FISHER
Chief District Judge

/s/ Stanley S. Brotman
STANLEY S. BROTMAN
District Judge

[Caption Omitted in Printing]

ORDER

[Filed March 5, 1984]

It is on this 5th day of March, 1984, ORDERED that the judgment be and the same is hereby amended to correct a clerical error. As amended the judgment should read:

"ORDERED, ADJUDGED and DECREED that the primary elections and elections for members of the House of Representatives shall be conducted, in New Jersey, until the further order of this court, or until the next decennial census, whichever is earlier, from the single member districts set forth in the Opinion filed herewith."

And it is further ORDERED that the final paragraph of the Opinion be and the same is hereby amended to conform to this Order.

/s/ John J. Gibbons
JOHN J. GIBBONS
Circuit Judge

/s/ Clarkson S. Fisher
CLARKSON S. FISHER
Chief District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 82-297

GEORGE T. DAGGETT,
Plaintiff,

v.

IRWIN I. KIMMELMAN, Attorney General of the
State of New Jersey, *et al.*,
Defendants.

—and—

Civil Action No. 82-388

EDWIN B. FORSYTHE, *et al.*,
Plaintiffs,

vs.

THOMAS H. KEAN, Governor of the
State of New Jersey, *et al.*,
Defendants.

JAMES J. FLORIO, *et al.*,
Intervenors

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that James J. Florio, et al,
Carmen A. Orechio, et al, Alan J. Karcher, et al, inter-
venors above named, hereby appeal to the Supreme Court
of the United States, from the Order entered by the three
Judge Court, on February 17, 1984, in this action, on re-

mand from the Supreme Court, said Order setting forth the Congressional Districts for New Jersey until the further order of the court, or until the next decennial census, whichever is later. This appeal is taken pursuant to 28 U.S.C. § 1253.

/s/ Leon J. Sokol
LEON J. SOKOL
Greenstone and Sokol
39 Hudson Street
Hackensack, New Jersey 07601
Counsel for Intervenor,
    Carmen A. Orechio

/s/ Kenneth J. Guido, Jr.
KENNETH J. GUIDO, JR.
Sonosky, Chambers, Sachse &
    Guido
1050 31st St., N.W.
Washington, D.C. 20007
Counsel for Intervenors,
    Florio, et al.

/s/ Lawrence T. Marinari
LAWRENCE T. MARINARI
Marinari & Farkas, P.C.
1901 N. Olden Avenue Ext.
Trenton, New Jersey 08618
Counsel for Intervenor,
    Alan J. Karcher

[Filed March —, 1984]

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

———

Civil Action No. 82-297

GEORGE T. DAGGETT,
Plaintiff,

v.

IRWIN I. KIMMELMAN, Attorney General of the
State of New Jersey, *et al.,*
Defendants.

—and—

Civil Action No. 82-388

EDWIN B. FORSYTHE, *et al.,*
Plaintiffs,

v.

THOMAS H. KEAN, Governor, *et al.*
Defendants.

JAMES J. FLORIO, *et al.,*
Intervenors

———

AFFIDAVIT OF THOMAS E. MANN

1. My name is Thomas E. Mann. I reside at 5407 Greystone Street, Chevy Chase, Maryland.

2. I am presently employed as Executive Director of the American Political Science Association, a position I have held since July, 1981. Prior to this position, I was co-director of the Congress Project at the American En-

terprise Institute, and assistant director of the American
Political Science Association. Since 1970, I have worked
as a staff associate and then as assistant director of the
American Political Science Association, an adjunct pro-
fessor at five universities, a political polling consultant to
the Democratic Study Group Campaign Fund, and a mar-
keting research consultant to the Public Broadcasting
Service.

3. I am a professional political scientist with a Ph.D.
(in political science) from the University of Michigan.
I have specialized in the study of congressional elections
throughout my professional career, both as a scholar and
as a political pollster. I served as a charter member of
the Standing Committee on Congressional Election Re-
search, National Elections Studies, Center for Political
Studies, during 1977 and 1978.

4. My publications include *Unsafe At Any Margin*:
*Interpreting Congressional Elections, Vital Statistics on
Congress 1980* (with John Bibby and Norman Ornstein),
The New Congress (with Norman Ornstein), "Candidates
and Parties in Congressional Elections" (with Raymond
Wolfinger), and "The Republican Surge in Congress"
(with Norman Ornstein), among others. I am an adjunct
scholar at the American Enterprise Institute and in that
capacity, I am currently preparing a study of the 1984
elections. A copy of my resume is attached as Exhibit 1.

5. I have been asked by the attorneys for the inter-
venors, James J. Florio, *et al.*, to analyze several redis-
tricting plans that were pending before the 200th Legisla-
ture of the State of New Jersey, and which are currently
pending before the 201st Legislature of the State of New
Jersey, including statistical analyses which contain elec-
tion results of prior elections and demographic data on
the congressional districts contained within each plan, and
to comment specifically on Senate Bill 3564 introduced in
the 200th Legislature by Senator Lynch and reintroduced

as Senate Bill 10 in the 201st Legislature by Senator Lynch.

6. All of these plans have unusually low deviations. A.4126 has a total deviation of 67 persons from the highest to the lowerst district, as does S.3564 (S.10). A.4087 has a deviation of 63 persons, and S.3784 has a total deviation of 60 persons. When expressed as a percentage, all of these plans have a total deviation of 0.01%.

7. When analyzed for mean deviation (as opposed to total deviation) I arrive at the following conclusions. A.4126 has a mean deviation of 10.92 persons or 0.002%, S.3564 has a mean deviation of 11.5 persons or 0.002%, S.3784 has a mean deviation of 11.92 persons or 0.002%, and A.4087 has a mean deviation of 13.21 persons or 0.003%.

8. Based upon the foregoing data, all of these plans are essentially equal in total deviation and are very close to absolute equality.

9. I also note that all of the aforementioned plans do not disturb municipal boundaries, a criterion adopted by the New Jersey Legislature in enacting Public Law 1982, Chapter 1, and in passing S.3564, which was subsequently vetoed by Governor Kean.

10. I have analyzed the plans for political fairness. I began by examining the 1978, 1980 and 1982 U.S. Congressional elections, the 1981 and 1983 State Senate elections and the 1981 and 1983 State Assembly elections to determine if the congressional districts under S.3564 and the other plans produced results that accurately reflected the statewide vote. The data for these and other elections were furnished to me by the office of Legislative Services of the New Jersey legislature and are attached to the Affidavit of Harold Berkowitz. I noted that the district results under S.3564 fairly reflected the statewide vote. In particular, in the two elections in which the Republi-

cans won a statewide majority of votes (1980 Congressional and 1981 State Assembly), a majority of S.3564 districts were carried by the Republicans. Using the test of fairness devised by Backstrom, *et al.* (*Minnesota Law Review*, Vol. 62 (1978), 1121-1159), that the majority party, when it has received a bare majority of the statewide vote, be in the majority in a bare majority of the districts, I conclude that S.3564 is fair.

There are problems, however, in using local races as a measure of natural party strength. "Gauging party strength by using the sum of party votes in individual districts instead of the vote totals for some common statewide race contaminates the results with the effects of a multitude of candidate personalities, campaign techniques, and strictly local issues." (Backstrom, *et al.*, p. 1127). Research on congressional elections has demonstrated conclusively that voting in House elections is strongly influenced by the presence of an incumbent and by the visibility and character of the local campaign. Party identification has become much less important in House elections. Consequently, it is inappropriate to use House or state legislative elections as a sole measure of natural party strength. I have chosen three recent statewide elections, namely the 1980 presidential election, the 1981 gubernatorial election, and the 1982 U.S. Senate election. These three elections allow us to analyze the political configuration of the districts under very different partisan conditions. The Republicans decisively won the 1980 presidential vote in New Jersey by a margin of 52% to 39%; they narrowly won the 1981 gubernatorial election, with the returns at a near 50% to 50% dead heat; the Republicans lost a close race in 1982 for the U.S. Senate by a margin of 48% to 51%. None of these elections can by itself serve as a measure of natural party strength, but a reasonable test of political fairness can be performed by examining the proposed districts for all three of them. My observations are as follows:

S.3564: the Republican candidate carried 11 out of the 14 districts in 1980, 8 out of the 14 in 1981 and 6 out of the 14 in 1982.

A.4087: the Republican candidate carried 12 out of the 14 districts in 1980, 7 out of 14 in 1981 and 5 out of 14 in 1982.

S.3784: the Republican candidate carried 12 out of of the 14 districts in 1980, 7 out of the 14 districts in 1981, and 5 out of the 14 districts in 1982.

A.4126: the Republican candidate carried 12 out of the 14 districts in 1980, 7 out the 14 districts in 1981, and 6 out of the 14 districts in 1982.

My conclusion from the above results is that none of these plans appears to give either party a significant advantage. When the statewide returns exhibits a decisive Republican victory (as in the 1980 presidential election), the districts under all four plans are swept by the Republicans (79% of the district under S.3564, 86% under the others). When the election is close statewide, the districts divide more evenly between the parties. Under S.3564, the 1981 and 1982 statewide winners carry a majority of districts. Consequently, the district results under S.3564 fairly reflect the statewide results, and neither party is prevented from winning a majority of districts when it achieves a statewide majority of votes. Under the other plans, the Republicans fail to carry a majority of districts in the 1981 gubernatorial election, even though they won statewide. Moreover, under two of the other plans, Republicans carry one less district in the 1982 senate election than under S.3564. Surprisingly, in the two closely contested elections, Republicans fare best under S.3564. Again, using the test of political fairness developed by Backstrom, *et al.*, I conclude that S.3564 provides for districts that are fair to the two parties.

11. I also note that S.3564 (S.10) is very similar in configuration to P.L. 1982, c.1, the plan held invalid by

the U.S. Supreme Court in *Karcher* v. *Daggett*. The congressional elections in New Jersey in 1982 were held in districts based upon P.L. 1982, c.1, and in those elections, every incumbent congressman except one won reelection. That incumbent, Congressman Hollenbeck, suffered at least as much from adverse national political tides and a vigorous challenge from the Democratic candidate as he did from redistricting. Hollenbeck lost many municipalities in the 1982 elections that he had represented in his old district and had carried in previous elections, and by margins comparable to those by which he lost in the new part of the district. The fact that all the other New Jersey congressional incumbents won in 1982 is *prima facie* evidence of the political fairness of P.L. 1982, c.1, with regard to incumbents of both parties.

12. I have been asked to comment on whether it is appropriate for a legislature to seek to protect incumbents in its redistricting plan. I believe that this practice is quite common across the states and is particularly understandable for a northeastern industrial state such as New Jersey. Research has demonstrated that senior members of a delegation, because of their seniority on important congressional committees, are in a position to help the State secure federal funds. Consequently, it is perfectly rational for a state legislature to try to protect its congressional incumbents as a matter of state policy.

13. I have been asked my opinion as to whether S.3564 would be considered a "partisan gerrymander". To this question, I must respond that I assume that Democratic and Republican legislators have sought in their districting plans to gain some advantage for their respective parties. I believe that such partisan interests are inevitably a part of the legislative process and therefore of the redistricting process. What is more important than intentions are results—whether either party will actually gain a significant and unfair advantage as a result of redistricting. It is my opinion that question must be answered in the

negative. When tested with appropriate measures of state-wide partisan strength, S.3564 appears to be politically fair, in that it gives neither party an unusual or unreasonable political advantage over the other. In that regard, it would not qualify as a "partisan gerrymander," as defined in the test set forth by Justice Stevens in his concurrence in *Karcher* v. *Daggett*.

14. I note that in all of the above mentioned plans, the sponsors adhere to contiguity of districts, and on that basis, all of the plans are equally acceptable. Similarly, as previously noted, all plans recognize and respect municipal lines and, on that basis, are equal.

15. In analyzing the demographic data, all of the plans maintain a majority of Black and Hispanic persons in District 10, the District which includes the City of Newark. But, in both A.4087 and S.3784, some minority strength is sacrificed in order to achieve a negligible reduction in population deviation. A.4087 has a total deviation of 63 persons and S.3784 has a total deviation of 60 persons, as compared to 67 persons in S.3564. In both cases, the plans reduced the total Black and Hispanic population in District 20 by 3,840 persons in order to achieve this small reduction in deviation. A later bill, A.4126, introduced by Assemblyman Zimmer, appears to recognize this trade-off. This plan uses the same basic map configuration of A.4087 and S.3784, but restores District 10 to the same configuration as that contained in S.3564. In so doing, A.4126 restores the Black and Hispanic populations of District 10 to the same as in S.3564 but also results in a total deviation of 67 persons, equal to that of S.3564. Accordingly, it appears that it is not possible to maximize the minority population of District 10 with any total deviation lower than 67 persons.

16. I have also been asked my opinion on the issue of dislocation of voters from their prior election district. Substantial dislocation is inevitable after the de-

cennial census, particularly in a state which has lost a congressional district, such as New Jersey, and is trying to fit its population into a smaller number of districts. Additionally, I note that since 1970 New Jersey has experienced a shift in population from the more urbanized counties to the suburban and rural counties, further exaggerating the problems of dislocation for the decennial redistricting. Many New Jersey voters were dislocated by the districts set in P.L. 1982, c.l. The issue now, however, is whether the current districts or those last in effect during the 1980 elections constitute the most appropriate base for measuring future dislocation. I believe it important to minimize dislocation from present districts in any subsequent redistricting. Voters have now had two years to become accustomed to their congressman and his or her district offices and staff. They are ill-served by interruptions in representations in the handling of important casework caused by the redrawing of district lines outside the normal decennial census.

With this background, I note the following as to the four plans offered for my review with regard to population dislocation. I am using the statistics provided to me by the Office of Legislative Service, Division of Information and Research. That office has taken each plan and compared it to P.L. 1982, c.1, using as the basic standard whether a municipality stays with its current incumbent congressman or moves to a district currently represented by another congressman. That analysis shows that in the case of S.3564, there is a total dislocation of 726,513 persons or 9.86% of the State's population. In the case of S.3784, there is a dislocation of 2,540,176 persons or 34.5% of the State's population. In the case of A.4126, there is a dislocation of 2,400,073 persons or 32.6% of the State's population, and in the case of A.4087, there is a total dislocation of 2,482,021 persons or 33.7% of the State's population.

17. I have been asked my opinion on the controversy surrounding the shapes of the districts in P.L. 1982, c.1,

and S.3564. There is some historical precedent for the configurations of the districts in S.3564. Upon examination of the maps of the 1950, 1960 and 1970 New Jersey congressional districts, it appears that the Fifth District of S.3564 encompasses parts of Bergen and Passaic counties and Sussex, Warren and Hunterdon counties, all of which have traditionally been districted together; the Fourth District encompasses Mercer and Burlington counties which have been historically grouped together and the Third District includes Mommouth and Ocean counties and also has historical precedent. In any event, the shape of the districts in S.3564 is due in part to the fact that municipal boundaries have been respected. The 567 municipalities in the State of New Jersey are of widely varying size and shape. Using these municipalities as building blocks for congressional districts inevitably results in districts less compact that might otherwise be achieved. There is no consequences among political scientists as to what constitutes "compactness" in electoral districts, or even how such a concept can be best measured. There is a general agreement, however, that districts which lack "compactness" are not necessarily "gerrymandered," nor do they inevitably damage communities of interest or other positive values sought in a redistricting plan.

Signed under the pains and penalties of perjury:

/s/ Thomas E. Mann
THOMAS E. MANN

Date: Feb. 2, 1984

46a

EXHIBIT 1

THOMAS E. MANN

Present Position

Executive Director, American Political Science Association, 1527 New Hampshire Avenue, NW, Washington DC 20036 (202) 483-2512, 1981 to present.

Professional Experience

Visiting Fellow and Co-Director, Congress Project (1979 to 1981) and Adjunct Scholar (1981 to present), American Enterprise Institute for Public Policy Research.

Chairman, Executive Committee, Consortium of Social Science Associations, 1982 to present.

Assistant Director (1977 to 1981), Staff Associate (1970 to 1976) and Director, Congressional Fellowship Program (1970 to 1980), American Political Science Association.

Adjunct Professor, University of Virginia (1980), Georgetown University (1979), Catholic University (1978), American University (1977), University of Massachusetts (1973-74).

Member, Technical Advisory Committee, Democratic National Committee's Commission on Presidential Nominations (Hunt Commission), 1981 to 1982.

Speaker, William Bennett Munro Memorial Lecture, Stanford University, May 12, 1983.

Speaker, Conference for Democratic Senators, Canaan Valley, West Virginia, October 2-4, 1981.

Lecturer, Congressional Quarterly Elections Seminars, 1980 to present.

Lecturer, U.S. Information Agency: Yugoslavia and Israel, May 1980; Wales, January 1981.

Marketing Research Consultant, Public Broadcasting Service, 1978 to 1981.

Political Polling Consultant, Democratic Study Group Campaign Fund, 1974 to 1978.

Member, Standing Committee on Congressional Elections Research, National Elections Studies, Center for Political Studies, 1977 to 1978.

Member, Democratic National Committee's Commission on Presidential Nomination and Party Structure (Winograd Commission), 1975 to 1978.

APSA Congressional Fellow, 1969-70. Served as legislative assistant to Representative James G. O'Hara and Senator Philip A. Hart.

Assistant Study Director, Survey Research Center, and Instructor, ICPSR Summer Program, University of Michigan, 1968-69.

Education

B.A., 1966, University of Florida (Phi Eta Sigma, Phi Kappa Phi, political science honors program, cum laude)

M.A., 1968, and Ph.D., 1977, University of Michigan. (NDEA graduate fellowship)

Selected Publications

"Mobilization of Liberal Strength in the House, 1955-1970: The Democratic Study Group," *American Political Science Review*, Volume 68 (June 1974), pp. 667-681. (With A. Miller and A. Stevens) Reprinted in Robert L. Peabody and Nelson W. Polsby (eds.), *New Perspectives on the House of Representatives* (Third Edition, Chicago: Rand McNally, 1977).

Career Alternatives for Political Scientists: A Guide for Faculty and Graduate Students (American Political Science Association, 1976).

Unsafe at Any Margin: Interpreting Congressional Elections (Washington, DC: American Enterprise Institute, 1978).

Articles in the *Washington Post* (1979), *San Diego Union* (1980), *Baltimore Sun* (1981).

"Candidates and Parties in Congressional Elections," *American Political Science Review*, September 1980. (With R. Wolfinger) Reprinted in Louis Sandy Maisel and Joseph Cooper, *Congressional Elections*, Sage Electoral Studies Yearbook, Volume 6 (Beverly Hills: Sage, 1981).

Vital Statistics on Congress 1980 (Washington DC: American Enterprise Institute, 1980). (With J. Bibby and N. Ornstein)

"1980: A Republican Revival in Congress?" *Public Opinion* (Oct/Nov 1980). (With N. Ornstein)

"Congress and the President: A Response to Lloyd Cutler," *Foreign Affairs* (Winter 1980-1981). (With N. Ornstein) Reprinted in Thomas E. Cronin (ed.) *Rethinking the Presidency* (Boston: Little Brown, 1982).

The New Congress (Washington, DC: American Enterprise Institute, 1981). (Co-editor with N. Ornstein and author of "Elections and Change in Congress.")

"The Republican Surge in Congress" in Austin Ranney (ed.), *The American Elections of 1980* (Washington, DC: American Enterprise Institute, 1981). (With N. Ornstein)

"The 1982 Election: What Will It Mean?" *Public Opinion* (June/July 1981). (With N. Ornstein)

"United States Congressmen in Comparative Perspective," paper presented at a conference on "The Role of Parliamentarians in Contemporary Democracies," Madrid, Spain, December 15-16, 1981. (To appear in Ezra N. Suleiman, ed., *Parliaments and Parliamentarians in Western Democracies.* (New York: Holmes & Meier, 1984).

"Changes in the External Political Environment of Congress: Implications for Presidential Leadership," in James Sterling Young (ed.), *Problems and Prospects of Presidential Leadership in the Nineteen-Eighties,* Volume II (Lanham, MD: University Press of America, 1982).

Vital Statistics on Congress 1982 (Washington, D.C.: American Enterprise Institute, 1982). (With N. Ornstein, M. Malbin and J. Bibby).

"Election '82: The Voters Send a Message," *Public Opinion* (December/January 1983). (With N. Ornstein).

The American Elections of 1982 (Washington, D.C.: American Enterprise Institute, 1983.) (Co-editor with N. Ornstein).

Personal Data

Born September 10, 1944 in Milwaukee, Wisconsin
Married to Sheilah Mann
Two children, Teddy (born May 18, 1977) and Stephanie (born March 10, 1979)

Home: 5407 Greystone Street
      Chevy Chase, Maryland 20815
      (301) 656-8437

October 1983

OFFICE OF LEGISLATIVE SERVICES
DIVISION OF INFORMATION AND RESEARCH

ELECTION DATA AGGREGATED BY
5-10

5-10	1978 U.S. SEN. DEMS.	1978 U.S. SEN. REPS.	MARGIN	1978 U.S. CONG. DEMS.	1978 U.S. CONG. REPS.	MARGIN	1980 PRES. DEMS.	1980 PRES. REPS.	MARGIN
01	78049	51530	27519	104312	32735	71577	86523	94933	-8410
02	75030	65456	9574	98315	43335	54980	81138	112228	-31079
03	78251	63488	14763	77359	61124	16235	74797	124040	-49243
04	81254	53048	28206	69564	62423	7141	94584	88639	3945
05	69361	82176	-12815	70972	82383	-11411	65776	140302	-74526
06	81614	52105	29509	59870	59671	199	38716	106657	-17941
07	74527	62466	12061	51110	83540	-32430	84794	108547	-23753
08	63261	51781	11480	76407	36268	40139	72676	101676	-29000
09	99665	69987	29678	84023	77558	6465	93844	127216	-33372
10	63563	21212	42351	71619	12865	58754	90610	35452	55158
11	85374	70373	15001	90530	59064	31466	85519	126324	-40805
12	66845	89466	-22618	44091	114095	-70004	68998	147491	-78493
13	68381	71058	-2677	62129	75320	-12892	67693	132909	-65216
14	95208	40153	55055	80996	33469	47527	90003	89512	491
** TOTAL **	1001186	844097	237087	1041596	833850	207746	1145671	1537926	-392235

APPENDIX E

EXHIBIT TO THE AFFIDAVIT OF HAROLD BERKOWITZ

1980 U.S. SEN. DEMS.	1980 U.S. SEN. REPS.	MARGIN	1980 U.S. CONG. DEMS.	1980 U.S. CONG. REPS	MARGIN	1981 GOV. DEMS.	1981 GOV. REPS.	MARGIN
84868	60193	24675	144962	48926	96036	115795	49813	65982
79409	76721	2688	117045	73889	43196	79287	90819	-11532
82360	93207	-847	98752	102144	-3392	73731	91429	-17698
87065	65999	21066	74970	103832	-28862	90443	63950	26493
63759	104573	-40814	74896	139790	-65094	59247	112630	-53383
84621	67851	16770	93685	94955	-1270	85586	77454	8132
79201	83329	-4128	60670	128235	-67565	77150	87529	-10379
72093	57959	14134	97933	67185	30748	68093	77343	-9250
102954	82673	20281	109013	124796	-15783	98942	91593	7349
70622	22175	48147	96225	19164	77061	76148	25883	50265
84178	86027	-1849	203301	90612	9699	84406	97785	-13379
59803	119493	-59890	41287	181542	-140255	59681	123739	-64058
73169	92425	-19256	90439	115018	-24579	83624	91938	-8314
90868	43768	47100	100129	68890	31239	93725	55725	38000
1114970	1046393	68577	1308347	1367178	-50831	1145850	1137630	8229

OFFICE OF LEGISLATIVE SERVICES
DIVISION OF INFORMATION AND RESEARCH

ELECTION DATA AGGREGATED BY
5-10

5-10	1981 STATE SENATE DEMS.	1981 STATE SENATE REPS.	MARGIN	1981 STATE ASSEMBLY DEMS.	1981 STATE ASSEMBLY REPS.	MARGIN	1982 U.S. CONG. DEMS.	1982 U.S. CONG. REPS.	MARGIN
01	97438	61271	36167	185419	119390	66029	108868	44040	64828
02	81732	84807	-3075	147224	171677	-24453	102724	47253	55471
03	76485	83316	-6831	148239	165186	-16947	102130	62323	39815
04	95192	65861	19531	163918	129697	34221	76591	82953	-6362
05	52461	115849	-63387	100421	216137	-115716	59199	103564	-44365
06	85028	63070	21958	176447	119289	57158	96410	50271	46139
07	70537	82514	-11977	147208	154574	-7366	73455	87161	-13706
08	73515	61995	11520	129314	132326	-3012	88194	38787	49397
09	97295	81369	15926	183074	162379	20695	101017	81051	19966
10	68640	20051	48589	130904	37945	92959	76684	14551	62133
11	80647	85887	-5240	150066	179270	-29204	103785	58901	44884
12	55060	118760	-63692	104505	229370	-124873	56204	116015	-59811
13	71690	97659	-25969	136512	194957	-58445	68835	93629	-24794
14	87268	43672	43596	175639	68604	87035	91802	33818	57984
** TOTAL **	1083796	1066880	16916	2078890	2100809	-21919	1205896	914317	291579

1983 STATE SENATE DEMS.	1983 STATE SENATE REPS.	MARGIN	1983 STATE ASSEMBLY DEMS.	1983 STATE ASSEMBLY REPS	MARGIN
66890	46900	19980	130459	93283	37176
60491	76819	-16328	122052	145606	-23554
73750	60678	13072	132021	134614	-2593
80248	44998	35250	144212	99434	44778
44370	90988	-36518	83892	158064	-74172
69169	51589	17580	142728	97169	45559
60815	56493	4322	119891	107925	11966
61628	46728	14900	111795	88432	23363
79445	57991	21454	121025	146765	-25740
41428	13742	27686	77470	25576	51894
63847	61472	2375	121543	119812	1731
42441	86180	-43739	80973	166631	-85658
56637	74108	-17471	103815	145956	-42141
52912	31385	21527	121509	61058	60451
854061	789971	64090	1613385	1590325	73060